

# TENNESSEE ADR NEWS

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## **Enforcement of Mediated Settlement Agreement Upheld by Tennessee Court of Appeals** **By: Ann Barker**

In a January opinion by Judge Herschel P. Franks the Tennessee Court of Appeals upheld the principle that absent fraud or mistake, an agreement reached in mediation to settle litigation is conclusive against a party seeking to void it. In doing so, the court reversed and remanded the trial court which had allowed the plaintiff to not comply with an agreement.

The case, *Golden v. Hood* E1999-02443-COA-MR3-CV, (Tennessee Court of Appeals at Knoxville) involved a mediated settlement agreement in an automobile accident case. The parties agreed on an amount of damages to plaintiff and the relinquishment of all claims against the defendant. Afterwards the plaintiff failed to comply stating that undue stress and duress had caused him to accept the agreement initially.

Citing fundamental principles of contract law, the court found the settlement agreement to be valid and was "bound to enforce it." *Bush v. Cathey*, 598 S.W.2d 777 (Tenn.Ct. App. 1979). The court further recognized that "mediation and arbitration are valuable tools which can make the process of dispute resolution more efficient, more economical, and equally fair." See Preamble to Tenn. R.S.Ct. 31.

The full text of the opinion can be found at the Tennessee Supreme Court web site. [www.tsc.state.tn.us](http://www.tsc.state.tn.us).

Ann Barker is Director of the Alternative Dispute Resolution Commission.

## **Ethical Considerations in Mediation – Part II** **By Ken Jackson**

### **Introduction**

In the last issue of *Tennessee ADR News* we addressed the topics of self-determination, competence, and professional advice. Here are summaries of some other standards:

### **Impartiality**

To be impartial, a mediator must behave as if she is free from favoritism or bias in word or deed, and must not give the appearance of being partial to one party. She must be evenhanded. This is the behavioral standard of impartiality; no one can judge her on internalized attitudes and beliefs. Yet the ethical mediator must have an internal guide that tells her when she can no longer be impartial and must withdraw, as well as when she must decline to serve as the mediator. This may arise when a mediator finds herself prejudiced by the personality, conduct, appearance, background, favoritism or other factors relating to an individual. For example, an expression of interest in giving the mediator future business may cause the mediator to become prejudiced for or against the offeror.

In dealing with the problem of appearances, a mediator may explain to the parties that she will be raising questions, seeking balance, playing the devil's advocate, testing possible solutions, and using other techniques to help them solve the problem with a reasonable result. She then will ask

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the parties to let her know if at any time they perceive or feel any unintended partiality in her behaviors so that she can correct her behavior or their impression.

**Neutrality**

While some mediators merge the concept of neutrality with that of impartiality, I view it as somewhat distinguishable. To be neutral, a mediator must have no interest in the outcome – settlement, partial settlement, stalemate or termination. In this sense, neutrality is an element of **Self-Determination**.

Nonetheless, mediators may have to guide the parties to an outcome that is fair to third parties. For example, in mediating family disputes, the mediator must cause the parties to consider the interests of third parties, such as the children, grandparents, and the court. In an environmental mediation, the interests of citizens in the settlement may be directly relevant. Indeed, there is no mediation that is free from the interests of third parties; one must decide whether that interest is sufficiently direct and immediate to warrant serious consideration.

Neutrality also refers to freedom from monetary, professional, friendship, social and other affiliations. In this sense, neutrality is an element of the **Conflict of Interest** standards. For example, a mediator has a duty not to unnecessarily prolong a mediation so as to increase his fees. Likewise, for court-ordered mediations, a mediator may feel a responsibility to the court.

**Conflict of Interest**

The mediator must determine if he has any past, present or possible future relationships with any party to the mediation, disclose them, and then (1) obtain the consent, preferably in writing, of the parties and/or their attorneys to his

serving as the mediator; and (2) make a personal decision as to whether or not there is such a clear conflict of interest that he cannot serve as a neutral, impartial mediator even given the consent of the parties.

A mediator cannot serve as counselor, attorney or therapist to either party during the mediation process, no matter what his regular profession might be. He may not solicit future professional employment. The slender thread that keeps an attorney-mediator from creating a lawyer-client relationship with a party to a mediation is where the lay person asks a question of a legal nature calling for a legal opinion knowing that the mediator is a lawyer (a given), in an environment which the lay person reasonably understands is in a legal context (a given) and the attorney-mediator does or does not provide such an opinion.

**Confidentiality**

Every mediator whose practices I am familiar with includes remarks about confidentiality in his opening statement. It is one of the prime selling points for mediation as opposed to public trials. Yet there are exceptions to confidentiality, both in the laws relating to mediation and in court decisions. The classic example is information about child abuse. Others may include the environment, securities, and other cases where the balancing of private interests in confidentiality may be outweighed by public interests in disclosure. Attorney-mediators may have reporting duties with respect to matters involving imminent danger to identifiable third persons.

Confidentiality of the process is subject to abuse by the parties and by the mediator. Indeed, the obligation of the mediator to conduct the mediation ethically is all the stronger because mediation generally is not subject to public scrutiny.

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*The TBA Dispute Resolution Section presents its...*

## Fourth Annual Dispute Resolution Forum

May 5 Nashville (BellSouth Building Auditorium)

Program Chair: Patricia Best Vital, Chattanooga  
 Chair, TBA Dispute Resolution Section

**PROGRAM** (6 CLE or CME credits, 5 General, 1 Dual)

8:30 - 9:00 a.m.	Registration
9:00 - 12:15 a.m.	First Track - Family Mediation
12:15 - 1:30 p.m.	Lunch (on your own) - BellSouth cafeteria available
1:30 - 4:45 p.m.	Second Track - Arbitration

**Family Mediation Track**

- ◆ Overview of Hamilton County Parenting Plan
- ◆ Mediation in the Pilot Project
- ◆ Parent Education Issues

**Speakers:**

Hon. L. Marie Williams, Circuit Court Judge, 11<sup>th</sup> J.D.  
 Nancy Ridge and Data Vess, Pilot Project Coordinators

**Arbitration Track**

- ◆ Selecting An Arbitrator
- ◆ Enforcing Arbitration Awards
- ◆ Preparation For and Strategies at the Hearing
- ◆ Challenging and Enforcing the Arbitration Award
- ◆ Panel Discussion/Questions and Answers

**Speakers:**

David K. Taylor, Boulton, Cumming, Conners & Berry,  
 Nashville  
 Richard Smith, Smith & Cashion, Nashville

**To Register:**

By Internet: Sign-up: [Http://www.tba.org/tennbaru/registrar.html](http://www.tba.org/tennbaru/registrar.html)  
 By Phone: (800) 899-6993 or 383-7421 in Nashville


**Mediators on the TBA-Link**

All Rule 31 approved mediators are located on the mediation page on the TBA-Link. This link has recently been revised. It now lists all approved mediators in a database format. You now have the capability of doing a search and downloading any of the fields available. The public access address is: [www.tba.org](http://www.tba.org). Choose the category for "Mediation".

## **Alabama Conference on Dispute Resolution**

By: Regina B. Newson

The Institute for Dispute Resolution at Jones School of Law, the Alabama Supreme Court Commission on Dispute Resolution, the Alabama Dispute Resolution Foundation, Inc., and the Alabama Administrative Office of the Courts presented the fourth annual Alabama Conference on Dispute Resolution on February 9, 2000 in Montgomery, Alabama at Faulkner University.

This conference was well attended by over 300 lawyers and social workers. All participants received continuing education credits for free. A box lunch was provided.

This conference began with Leonard L. Riskin a professor at the University of Missouri-Columbia School of Law, talking about the role of mediation in the new millennium. He has written numerous studies on satisfaction in mediation - evaluative vs facilitative. He concluded that people want to be able to express their feelings and work out their own solutions. Professor Riskin spoke of mediation as a tool for layers to use to help solve client problems, help clients determine what is really at stake; what they want and how to get there. Mediation enhances the profession of law. "Without laws there can be no mediation."

Do lawyers make better mediators than people in other professions? The answer was that he did not know, however, there was room for each profession in mediation. Everyone will bring something to the table that can advance the field of mediation.

After he gave his keynote address, the Conference broke into 5 tracks. Each presenter was well known in his or her respective field. The audiences had lots of questions and solutions to various dilemmas

that had arisen in mediation. It was a great learning experience for all concerned.

The luncheon speaker, Peter Steenland, of the U.S. Department of Justice, said that mediation is being used more and more in the federal courts. The sheer number of cases in federal court is so great that the court cannot handle all the cases.

He also talked about dropping the word "Alternative" for ADR. He suggested that alternative is no longer a correct assessment of ADR. Alternative leaves the public with the perception that it has not had its day in court/or with the legal system. Alternative has become mainstream.

Steenland talked about 3 divisions of Dispute Resolution. Judicial Settlements, Arbitration and Mediation. Of these three Mediation is the most popular. People appear to get more satisfaction from Mediation than from either Judicial Settlements or Arbitration.

Steenland said that creative solutions can and must be found in mediation that simply are not allowed in courts and arbitration. The focus has to be on the parties involved and what will make them happy with their decisions.

He concluded that the future of mediation is bright, however, we (mediators) must take mediation to any forum where we can be heard. It is our jobs to convince the public and lawyers that mediation is the best way to solve more disputes. We must be diligent and vigilant in our advancement of mediation.

Steenland can be contact at the Justice Department web site at <http://www.usdoj.gov/>.

Regina B. Newson is an approved Rule 31  
General Civil and Family Mediator.

## ADR Summit of the States Planned for June, 2000

**Lexington, KY, February, 2000 -**  
The Council of State Governments (CSG) will hold the first-ever "Summit of the States on Conflict Management and Dispute Resolution" June 8 - 10, 2000 at the Marriott Griffin Gate Resort in Lexington, Kentucky. The Summit, the initial program of the National Institute for State Conflict Management at CSG, is expected to attract representatives from the government, business, legal and dispute resolution practitioner communities. Harvard University's Roger Fisher will deliver the keynote presentation.

"Every Governor in the country will have the opportunity to appoint an ADR (Alternative Dispute Resolution) Ambassador to attend the Summit," said Daniel Sprague, CSG Executive Director. "The Summit represents the first comprehensive national conference designed to meet the needs of the state and territorial government community and to link it to top scholars and practitioners in the ADR field," Sprague said.

CSG is the premiere national organization of elected and appointed officials from the three branches of government in the fifty states and five U.S. territories. Through its headquarters in Lexington, Kentucky and its six office locations across the country, CSG is uniquely positioned to provide a range of conflict management and dispute resolution services to states.

Summit registration is open to the public, however, space is limited. Additional information about the Summit is available on the CSG website ([www.csg.org](http://www.csg.org)) or by contacting Bert Harberson with the Center for Leadership,

Innovation & Policy at CSG. (Phone: 606-244-8228, email: [bharberson@csg.org](mailto:bharberson@csg.org)).

The ADR Commission is in touch with the Governor Sundquist's office regarding the Summit. You may want to contact the CSG yourself. If you decide to attend, please the ADR Commission know.



**(Ethical... Continued from Page 2.)**

### **Fees and Expenses**

Rule 31 requires a mediator to give a written explanation of the fees and expenses, including time (hourly rates) and payment terms prior to the mediation. *See* Rule 31, App. A (9) for details of this requirement. Contingent fees are prohibited.

### **Other Ethical Considerations**

1. The obligation not to unnecessarily prolong mediation, and to avoid delays where possible. *See* Rule 31, App. A (4).
2. Concluding mediation with or without agreement or with partial agreement. *See* Rule 31, App. A (10). Impassing, adjourning or terminating a mediation may be an ethical duty of the mediator.
3. Advertising. *See* Rule 31, App. A (12).
4. Advancement of Mediation, e.g., pro bono requirements for Rule 31 mediators. *See* Rule 31, App. A (14).

Ken is a Rule 31 Listed Family and Civil Mediator and is Of Counsel with the law firm of Neal & Harwell PLC in Nashville.

**M.A.T. SPRING CONFERENCE**  
**MARCH 10 - 11, 2000**  
**UNIVERSITY CLUB OF NASHVILLE**  
**VANDERBILT UNIVERSITY COMPLEX**

**Program Agenda**

**March 10, 2000**

- 8:30 a.m. **Registration, coffee**
- 9:00 a.m. **The Future of ADR in Tennessee  
The Florida & Kentucky  
Experience**  
 Nancy Palmer, Bill Palmer,  
 Melinda Wheeler & Tony Beleck
- 10:30 a.m. **Break**
- 10:45 a.m. **The Future of ADR in Tennessee**
- 12:00 **Lunch honoring Parenting Plan  
Pilot Project**
- 1:00 p.m. **Mediating the Civil Case  
Techniques & Tips That Work**  
 Panel: Jocelyn Dan Wurzburg, Tim  
 Witten, Joe Manuel, Charles  
 Dupree
- 2:45 p.m. **Break**
- 3:00 p.m. **Mediating The Family Law Case  
Techniques & Tips That Work**  
 Moderator: Mitchell A. Byrd  
 Panel: Mary Francis Lyle, Charlotte  
 Boatwright & Wright Tisdale
- 5:00 - 6:00 p.m. **Reception**  
 Sponsored by Chattanooga Law &  
 Mediation Center

**March 11, 2000**

- 8:30 a.m. **Registration**
- 9:00 a.m. **Membership Meeting**
- 11:30 a.m. **Lunch**  
 Keynote Address  
 Tennessee Supreme Court Justice  
 Adolpho A. Birch, Jr.
- 12:45 p.m. **MAT Award of Distinction**
- 1:00 p.m. **Mediation Ethics**  
 Moderator: Carol Berz  
 Panel: Jesse Joseph, Newton Allen
- 3:00 p.m. **Break**

3:15 p.m. **Parenting Plan, Parenting  
Education & Mediation - The  
New Law**

Moderator: Nancy Ridge  
 Panel: Nancy Palmer, Ann  
 Barker, Nancy Ridge

5:15 p.m. **Conference Adjournment**

Conference Fee and Registration Deadlines  
 Early Bird and MAT Member Registration by 3-  
 5-00

- ☐ Friday all day (Includes lunch) \$200
- ☐ Saturday (Includes lunch) \$150
- ☐ Full Conference (11.5 hours) with lunches,  
 keynote address & all conference materials  
 \$275

After 3-5-00 or at the door

- ☐ Friday all day (Includes lunch) \$250
- ☐ Saturday (Includes lunch) \$175
- ☐ Full Conference (11.5 hours) with lunches,  
 keynote address & all conference materials  
 \$350

Fax/phone/mail in registration form. Check for  
 the appropriate amount must be sent with your  
 registration form to:

Attn: Mitchell A. Byrd, Treasurer  
 Mediation Association of Tennessee, Inc.  
 102 Historic Robinson Building  
 622 Georgia Avenue  
 Chattanooga, TN 37402  
 Fax: 423-265-3101

For more information, call (423) 265-3057 or 1-  
 888-MAT-TENN.

Prices for full conference, includes cocktail  
 reception on Friday evening (heavy  
 hors'doeuvres) and cash bar, and lunch for the  
 keynote address on Saturday.

Note: The above Conference fees do NOT  
 include additional fees for those attendees who  
 wish to receive CLE, CME and/or CEU credits  
 for their attendance.

**MEDIATION CLE/CME COURSES AVAILABLE****These trainings will meet the continuing education requirements of Rule 31****CHATTANOOGA****March 3, 2000**

Advanced Civil: Mediating Employment Cases  
Private Dispute Resolution Services  
Phone: (423) 266-4050

**March 17, 2000**

Advanced Civil: Mediating Personal Injury Cases  
Private Dispute Resolution Services  
Phone: (423) 266-4050

**March 17, 2000**

Domestic Violence Issues in Family Law: Divorce, Child Custody & Orders of Protection (6 Hrs.)  
Tennessee Bar Association  
Phone: (800) 899-6993

**March 31, 2000**

Advanced Civil: Mediating Contract Cases (6 hours)  
Private Dispute Resolution Services  
Phone: (423) 266-4050

**April 14, 2000**

Family: TN Parenting Plan Law, Policies/Procedures (8 hours)  
Private Dispute Resolution Services  
Phone: (423) 266-4050

**April 28 - 29, 2000**

Family: Domestic Violence, Law and Justice System (12 hours)  
Private Dispute Resolution Services  
Phone: (423) 266-4050

**JOHNSON CITY****March 10, 2000**

Domestic Violence Issues in Family Law: Divorce, Child Custody & Orders of Protection (6 Hrs.)  
Tennessee Bar Association  
Phone: (800) 899-6993

**KNOXVILLE****March 29; April 26; May 10; June 28; July 19; August 11; September 13 and November 1, 2000.**

Effective Communication for Improved Client Relationships  
Communication Consultants, Inc.  
Phone: (423) 693-5622

**March 1; April 5; May 3; June 14; July 12; July 26; August 2; September 20; and December 6, 2000**

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**TULLAHOMA****March 24, 2000**

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Tennessee Bar Association  
Phone: (800) 899-6993

## **National Standards for Family Mediation Being Developed**

By: Ann Barker

On February 26, I attended a one-day symposium convened by the Family Law Section of the American Bar Association, the National Council of Dispute Resolution Organizations, and the Association of Family & Conciliation Courts. The purpose of the meeting was to put the final touches on the Draft Model Standards of Practice for Family and Divorce Mediation. The Model Standards have been in the works for several years, and essentially the same group last met in October 1998 to write the current draft.

The standards are an attempt to provide "best practice" guidelines, especially for family mediators who do not have state statutes, court rules, or professional regulations to follow. The standards address issues such as self determination by the parties, qualifications for family mediators, family mediation format, how to identify and deal with conflicts of interest, impartiality, knowledgeable decision-making, confidentiality, reporting requirements, domestic violence, and advertising.

The drafting group consisted of mediators with many differing points of view. Their backgrounds were diverse: law, social work, practicing mediator, academic, state court employee, mediation association representative, community facilitator, to name a few. Significant though slow progress was made and the existing draft was rewritten substantially.

Prof. Andrew Schepard of Hofstra University School of Law, reporter for the project, will incorporate the changes and issue another working draft in the next six months. The draft can be located on the web site for the Association of Family and Conciliation Courts at [www.afccnet.org](http://www.afccnet.org).

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